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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/659,089
Filing Date: September 10, 2003
Appellant(s): SALEMI ET AL.

Brian M. Mattson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3/17/2008 appealing from the Office action mailed 10/26/2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is deficient. 37 CFR 41.37(c)(1)(v) requires the summary of claimed subject matter to include: (1) a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number, and to the drawing, if any, by reference characters and (2) for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function

and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The brief is deficient because it does not provide adequate reference in the Specification for the claimed subject matter, as detailed below.

Claim 30 is a process claim and is discussed on p 3 with reference to Figs. 2 and 4. The referenced figures cannot show the steps in a process, and only show two embodiments of sheets, neither of which is made by the claimed process. Figs. 2 and 4 fail to show the steps providing a sheet ... that is substantially flat and forms a plane, connecting any layers to the sheet, scoring a water resistant layer, and providing a plurality of depressions. The Figures also cannot show the composition of the antimicrobial layer. Fig. 2 fails to show a water resistant layer or a second antimicrobial layer. Fig. 4 shows two antimicrobial layers but fails to show a water resistant layer. Item 22 in Fig. 2 is described as a "connecting a water resistant layer to the first side of the sheet" (p 3, 2nd par, lines 5-6) and is also referenced as an antimicrobial layer made from polyethylene having silver zeolite (p 3, 2nd par, lines 11-12). A reference cited to support a second antimicrobial layer is p 20, lines 26-29 and item 4b in Fig. 4 of the Specification. The cited lines on p 20 describe a portion of the indenting process (1250) for the sheet of Fig. 2 and cutting the layer combination of step 1250 into sheets, none of which has any relation to Claim 30. Additional support for the claim is cited at p 17, line 30 to p 19, line 9, which describe the uses of the indented microbial paper of Fig. 1

and a partial method of making the paper shown in Fig. 11a, none of which has any relation to Claim 30.

Claim 31 is a process claim and is discussed on pp 3-4 with reference to Figs. 7 and 4. The referenced figures cannot show the steps in a process (as discussed previously), only two embodiments of sheets, neither of which is made by the claimed process. Fig. 7 shows three water resistant layers but fails to show a second antimicrobial layer. Fig. 4 shows two antimicrobial layers but fails to show a water resistant layer. Reference to a second antimicrobial layer is cited at p 20, lines 26-29 and item 4b in Fig. 4, which has been discussed previously. The cited lines on pp 24-26 of the Specification describe a portion of Fig. 15, which is a process for making the sheet of Fig. 5, the sheet of Fig. 6 and a portion of Fig. 16, which is a process of making the sheet of Fig. 6, none of which provides support for the claimed process.

Claim 32 is a process claim and is discussed on pp 4-5 with reference to Fig. 6. The referenced figure cannot show the steps in a process (as discussed previously), only the arrangement of layers in a sheet that can be made by the claimed process. Fig. 6 shows two water resistant layers, two base layers, an adhesive layer and an antimicrobial layer. Reference is made to item 16 in Fig. 6 for providing a sheet (p 4, last par, line 2). Fig. 6 has two base layers, 16a and 16b, but no layer labeled 16 as described in the Appeal. The cited lines on pp 22-24 describe a use for the sheet of Fig. 4, Fig. 14, which is a process for making the sheet of Fig. 4, the sheet of Fig. 5 and a portion of Fig. 15, which is a process of making the sheet of Fig. 5, none of which provides support for the claimed process.

Claim 33 is a process claim and is discussed on p 5 with reference to Fig. 5. The referenced figure cannot show the steps in a process (as discussed previously), only the arrangement of layers in a sheet that can be made by the claimed process. Fig. 5 shows two base layers, an adhesive layer and an antimicrobial layer. The cited lines on pp 21-22 describe a use for the sheet of Fig. 3, Fig. 13, which is a process for making the sheet of Fig. 3, and a portion of the sheet of Fig. 4, none of which provides support for the claimed process.

Claim 34 is a process claim and is discussed on pp 5-6 with reference to Fig. 10. The referenced figure cannot show the steps in a process (as discussed previously), only the arrangement of layers in a sheet that can be made by the claimed process. Fig. 10 shows four water resistant layers, four base layers, three adhesive layers and an antimicrobial layer. The cited lines on pp 28-30 describe a portion of Fig. 17, which is a process for making the sheet of Fig. 7, the sheets of Figs. 8 and 9, Fig. 18, which is a process for making the sheet of Fig. 8, and a portion of Fig. 19, which is a process of making the sheet of Fig. 9. The only portion that provides support for the claimed process is on p 28, lines 17-20, which describes using an indenter to texture the layer combination with alternating high and low points and/or channels.

Claim 35 is describes a paper and is discussed on p 6 with reference to Fig. 2. The referenced figure shows the claimed arrangement of layers but cannot show a plurality of depressions uniformly spaced across both the length and width of the base as claimed, or that the antimicrobial surface has silver zeolite. The cited lines on pp 17-

19 describe uses for the sheet of Fig. 1 and Fig. 11, which is a process for making the sheet of Fig. 1, none of which provides support for the claimed process.

Claim 44 is a process claim and is discussed on pp 6-7 with reference to Fig. 2. The referenced figure cannot show the steps in a process (as discussed previously), only the arrangement of layers in a sheet that can be made by the claimed process. The cited lines on pp 17-19 have been discussed previously and do not provide support for the claimed process

Claim 51 is a process of use claim and is discussed on pp 7-8 with reference to Fig. 5. The referenced figure cannot show the steps in a process (as discussed previously), only the arrangement of layers in a sheet that does not correspond to the claimed sheet because the sheet of Fig. 5 has no water resistant layer. The citation of p 14, lines 27-28 refers only to indented microbial paper. The citation of p 13, lines 33-34 does not exist as p 13 only has 30 lines of text. The citation of p 16, lines 2-10 refer to a description of the composition of the antimicrobial layer.

In summary, it appears that many of the citations used are from a document that is not in the record and not a part of the application as filed. It also appears that, in referring to two completely different embodiments (two Figures showing completely different sheets) to support some claims, the appellants are stating that multiple embodiments can be combined by one of ordinary skill in the art to arrive at a new and entirely different embodiment.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

It is noted that the Santelli reference supplied in Appendix C is incomplete and Appendices D, E, F and G, indicated as having the other cited prior art references attached, are empty.

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner. Claims 30-31, 34, 36, 38-39, 43-45, 47-48 and 55 rejected under 35 U.S.C. 112, 1st paragraph and Claims 30, 33-34, 37, 41, 44-45, 47-48, 51 and 53-55 35 U.S.C. 112, 2nd paragraph.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.
It is noted that there are two identical claims appendices.

(8) Evidence Relied Upon

2004/0071902	Santelli	4-2004
6436422	Trogolo et al	8-2002
6179141	Nakamura	1-2001
6274232	Otten et al	8-2001
5921062	Weder	7-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 30-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Santelli (US 2004/0071902) in view of Trogolo et al (6436422) and Nakamura (6179141) and further in view of Otten et al (6274232).

Santelli discloses a process for making a biocide containing laminate comprising:

- providing a plastic film having first and second sides, which are opposite one another,
- treating the first side of the film with a corona discharge (scoring) to make it receptive to adhesives,
- cold laminating (connecting) a paper sheet to the plastic film,
- associating a biocide (bactericide, fungicide, pesticide, moldicide, mildicide, viricide) with the laminate (p 2, par 19; p 3, pars 28 and 30).

The Examiner considers the recited biocides to be antimicrobials. The particular biocide can be selected by one of ordinary skill in the art for the intended purpose (p 3, par 26). The plastic film can be polyethylene, thus forming a water resistant layer, (p 3, par 29; p 5, pars 52 and 53). Additional paper and plastic layers can be applied using adhesive cold lamination to form laminates having multiple plastic and paper layers. Laminates of paper-plastic, paper-plastic-paper, plastic-paper-plastic, plastic-paper-plastic-paper-plastic, paper-plastic-plastic, paper-plastic-plastic-paper, paper-plastic-paper-plastic are specifically recited (p 2, pars 19 and 21; p 3, par 34; p 4, par 42; p 5, pars 50 and 54). The biocide can be applied in a variety of ways depending on the form of the

laminate (p 3, par 27). When multiple layer laminates are made, multiple biocide applications can be made to the paper layers or the adhesives (p 5, par 50). The biocide can be applied by spraying, brushing or dipping (p 4, par 37). The laminate is made as a sheeting material, which the Examiner construes as being substantially flat and forming a plane, and can further be made into a pouch, envelope or container, wrapped around an article (e.g.-food), or made into a tape for sealing a carton (p 5, pars 47-49, 51 and 53). The sheets inherently have a length and a width.

In the disclosure of Santelli, one layer can be called the "sheet having a first side and a second side" or "base having a top side and a bottom side" of the instant claims and the one or more plastic layers are water resistant layers. The paper layers or adhesive layers between the plies can contain biocidal material thus can be antimicrobial layers. Thus, in a multilayer laminate, one or more water resistant layers and a paper layer can be located between the "sheet having a first side and a second side" or "base having a top side and a bottom side" and an antimicrobial layer. Further, the top and bottom layers can be antimicrobial layers. For instance, a paper-plastic-plastic -paper laminate can comprise, in sequence, an antimicrobial layer, a water resistant layer, a base sheet and an antimicrobial layer. Absent evidence showing special or surprising advantages of a particular structure, one of ordinary skill in the art would have readily envisioned any of the claimed combinations of layers from the disclosure of Santelli.

While the order of assembly of the laminates of Santelli differs from the claimed process, no evidence has been provided to demonstrate that the sequence of

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laminating the layers is critical to the instant invention and performing the laminating steps in any sequence would have been obvious to one of ordinary skill in the art in the absence of evidence of new or unexpected results. Ex parte Rubin , 128 USPQ 440 (Bd. App. 1959) (Prior art reference disclosing a process of making a laminated sheet wherein a base sheet is first coated with a metallic film and thereafter impregnated with a thermosetting material was held to render prima facie obvious claims directed to a process of making a laminated sheet by reversing the order of the prior art process steps.). See also In re Burhans, 154 F.2d 690, 69 USPQ 330 (CCPA 1946) (selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results).

Santelli does not disclose an antimicrobial layer of polyethylene containing silver zeolite or a plurality of depressions or channels in the sheet.

Trogo et al discloses that an antibiotic low density polyethylene having 20 wt.% silver containing zeolite is commercially available and is used to make an antimicrobial coating for application to various substrates by spraying or dipping (Abs; col 5, lines 4-21 and 42-47; col 6, lines 1-7 and 51-53).

Nakamura discloses an antimicrobial layer for preventing bacteria from entering an airtight container. The antimicrobial layer comprises silver zeolite in polyethylene (col 1, lines 7-16; col 5, lines 3-13).

Trogo et al and Nakamura do not disclose depressions or channels in the sheet.

Otten et al discloses an absorbent and cut resistant sheet comprising multiple layers, including an absorbent layer, a polymeric cut resistant layer, a cover layer that includes anti-bacterial agents and a liquid impervious backing layer. The backing layer can also contain antibacterial agents (Abs; col 1, lines 12-17; col 3, lines 26-33; col 3, line 64 to col 4, line 21; col 5, lines 24-28 and 61-65; col 6, lines 58-65; col 7, lines 14-16). The cut resistant layer has a plurality of openings punched, pressed or moulded into the layer to provide drainage of liquids at the cutting surface to the surface of the lower absorbent layer (col 4, lines 45-56; Fig 1). Figure 1 shows these openings arranged in rows extending across the length and width of the layer. The cut resistant layer can also comprise a plurality of fold lines that are grooves (or channels) extending across the entire sheet, and which are formed by pressing, embossing or moulding (col 5, line 66 to col 6, line 10). The fold lines allow easier folding of the sheet for handling or disposal (col 6, lines 25-32). The sheet protects a countertop during food preparation (col 1, lines 10-26).

Santelli, Trogolo et al, Nakamura, Otten et al and the instant invention and the instant invention is analogous as pertaining to treating laminates to impart antibiotic or antimicrobial properties thereto. It would have been obvious to one of ordinary skill in the art to apply a commercially available polyethylene containing silver zeolite to one or more paper layer to form an antimicrobial layers in the laminate of Santelli in view of Trogolo et al and Nakamura as a well known antimicrobial composition usable with food items. It would also have been obvious to provide a plurality of depressions too allow drainage of liquids away from the surface contacting food or other objects.

Alternatively, it would have been obvious to provide a plurality of grooves to facilitate handling and disposal of the sheet.

Claims 49-51 and 53-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Santelli in view of Trogolo et al and Nakamura and further in view of Otten et al, as used in the preceding rejection, and even further in view of Weder (5921062).

The disclosures of Santelli, Trogolo et al, Nakamura and Otten et al are used as above. Santelli discloses using the antimicrobial laminated paper for forming a package to protect a food substance (Abs). Santelli, Trogolo et al, Nakamura and Otten et al do not disclose shredding the sheet or dividing the sheet into a plurality of sheets, nor do they disclose the method of using the paper to protect against contamination.

Weder discloses a packaging sheet having an antimicrobial agent (Abs). The sheet comprises a base sheet with portions thereof that permit selective control of the atmosphere to which the contents are exposed and an antimicrobial agent disposed thereon (surface antimicrobial layer) (col 4, lines 45-54; col 7, lines 46-47). The sheet has an upper and a lower surface and may comprise multiple layers connected together or adhered together by bonding material (col 4, lines 64-66; col 5, lines 26-32; col 6, lines 22-23). The sheet can comprise thermoplastic or paper layers (col 7, lines 14-24). The antimicrobial material layer can be applied by spraying, brushing, immersion, or in a label, sticker or decal applied to the sheet (col 8, lines 55 to col 9, line 9). The

antimicrobial layer can be a second sheet of material connected to the base sheet (col 9, line 55-58).

Weder discloses that a plurality of the packaging sheets can be connected linearly and rolled. Preferably the plurality of sheets are connected by perforations (Fig 5) such that they may be separated from the roll (col 10, lines 13-22), thus dividing the sheet into a plurality of sheets. Figure 5 shows a row of perforations (indentations) spaced uniformly across the sheet. The sheet can also be shredded into small pieces for decorative purposes (col 7, lines 8-11; col 11, lines 39-46, Fig 11).

Weder discloses a method of using the sheet to protect an object (cols 12-14 and 18-19; Claims 1-4) by wrapping the sheet around the object (Figures 12-15 and 16-19) or to completely enclose an object (Figures 29-30 and 32-33). The sheet, shown with a perimeter larger than the object to be wrapped, is placed on and covers a flat surface (Figs 12, 16 and 29). The object is placed on the sheet within the perimeter of the sheet and the sheet separates the object from the surface. The sheet is wrapped around the object (Figs 13-14, 17-19) or the object is completely enclosed (Figs 29, 30, 32 and 33) in the sheet. The object is thus protected by the antimicrobial surface (Claims 1-4).

Although Weder does not expressly disclose that the object is placed on the antimicrobial surface, it would have been obvious to one of ordinary skill in the art to do so to take full advantage of the antimicrobial properties of the sheet.

The art of Santelli, Trogolo et al, Nakamura, Otten et al, Weder and the instant invention is analogous as pertaining to antimicrobial paper and the use thereof. Both Santelli and Weder disclose the use of the antimicrobial paper to enclose and protect

food. It would have been obvious to one of ordinary skill in the art to protect food or another object by wrapping or enclosing it with the flexible sheet of Santelli in view of Trogolo et al and Nakamura and further in view of Otten et al using the method of Weder as a known and functionally equivalent option. Liquids on the antimicrobial surface would be separated from the food or object thereon and drain through the openings to the top surface of the sheet below, as taught by Otten et al.

The instant Claims recite a broad range of weight for the antimicrobial paper. Since the instant Disclosure recites no particular inventive advantage for using paper of the claimed weight, but merely recites "a weight range between, for example, 16.5 pounds and 90.00 pounds" (p 16, lines 1-2), it would have been obvious to one of ordinary skill in the art to use a paper of any weight, including the claimed range, as a functionally equivalent option and have a reasonable expectation of success. It would also have been obvious to shred the paper and use the shreds in a decorative manner as a known use for such papers to minimize fungal and bacterial growth on the decorations.

(10) Response to Argument

In response to Appellant 's arguments against the references individually on pp 25-27, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Regarding the argument on pp 30-31 that there is no suggestion to combine the

references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). Reasons for the combination have been set forth in previous Office Actions, but the topic is further treated herein.

Appellant argues on pp 25-26 that Santelli only discloses a few specific embodiments and does not disclose a plastic-paper-plastic-plastic laminate representative of the instant invention. Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. In *re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). Furthermore, “[t]he prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed....” In *re Fulton*, 391 F.3d 1195, 1201, 73 USPQ2d 1141, 1146 (Fed. Cir. 2004). As indicated in the rejections, Santelli discloses laminates having multiple plastic and paper layers and that additional layers or plies can be added using similar techniques (p 4, par 42). The only requirement is that plastic surfaces are corona-discharge treated; no special treatments are needed for paper layers except that they are somewhat dry before being laminated. Thus multiple paper or plastic (water resistant) layers can be combined between the surface layers of the sheet and fall within the disclosure of Santelli.

Santelli also discloses that, where multiple layer laminates are utilized, the biocide can be applied to any paper or adhesive layer (p 5, par 50). The biocide can be applied by spraying, brushing or dipping (p 4, par 37) and can be applied to an exposed, or surface, paper layer (p 4, par 39). For instance, a paper-plastic-plastic-paper laminate can comprise, in sequence, an antimicrobial layer (paper), a water resistant layer (plastic), a base sheet (plastic) and an antimicrobial layer (paper). Note that the instant claims do not recite that the base sheet must be paper. In a second example, in a paper-plastic-paper-plastic-paper laminate, the middle paper layer can be a base sheet, the outer layers can comprise antimicrobial and the two plastic layers can be water resistant layers. The antimicrobial sprayed on the paper forms a polyethylene with silver zeolite layer or, at least, such a layer would have been obvious to one of ordinary skill in the art. Note that the open claim language of the instant invention allows for extra layers to be present. The other claimed layer combinations would also have been obvious embodiments.

As a further response, the appellants have combined various disclosed embodiments to make new combinations of layers not specifically taught in any of the multiple embodiments disclosed in the instant Specification (see summary of claimed subject matter as well as the arguments on pp 11-18 against the withdrawn rejections under 35 U.S.C. 112, 1st paragraph), thus strengthening the reasoning used herein that it would have been obvious to one of ordinary skill in the art to make layered antimicrobial sheets by adding additional layers or by combining embodiments disclosed by Santelli. Appellants have also argued that a wide variety of base sheet,

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paper, water resistant layer and antimicrobial layer combinations are permissible in the paragraph bridging pp 21-22 of the arguments against the withdrawn rejections under 35 U.S.C. 112, 2nd paragraph.

Santelli does not disclose an antimicrobial layer of polyethylene containing silver zeolite or require any specific biocide, but states that those of ordinary skill in the art can select the desired biocide for the intended use as well as the method of incorporation (p 3, par 26).

Trogolo et al discloses a polyethylene having silver zeolite as a commercially available product that can be applied to various substrates by spraying or dipping. Any substrate to which the product adheres (e.g. paper) is usable with the product (col 5, lines 42-47). Nakamura discloses using an antimicrobial layer comprising silver zeolite in polyethylene to protect the contents of air tight beverage containers, thus the claimed antimicrobial product is safe for use with food.

Santelli discloses using the antimicrobial laminated paper to protect a food substance (Abs). It would have been obvious to one of ordinary skill in the art to use a polyethylene having silver zeolite as the antimicrobial substance in the layered sheet of Santelli in view of Trogolo et al and Nakamura as a, commercially available product safe for use with food. When sprayed onto a paper layer, the polyethylene having silver zeolite forms the claimed antimicrobial layer.

Regarding the depressions or channels in the sheet, Santelli discloses using the antimicrobial laminated paper to protect or wrap around a food substance, thus the sheet contacts the food substance (Abs). Otten et al discloses a multiple layered sheet

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used for food preparation (thus also contacting the food) comprising absorbent layer (paper layer), a polymeric cut resistant layer, an antimicrobial cover layer and a liquid impervious (water resistant) backing layer that can contain antibacterial agents. The sheet has a plurality of punched, pressed or moulded openings arranged in rows extending across the length and width of the sheet to provide drainage of liquids to the surface of the lower absorbent layer (also a top surface of the sheet). The sheet can also comprise a plurality of pressed, embossed or moulded grooves (or channels) extending across the entire sheet to allow easier folding of the sheet for handling or disposal. It would have been obvious to one of ordinary skill in the art to form the rows of openings to drain or channel liquids away from a food substance in the product of Santelli to prevent contamination or spoilage. It would also have been obvious to provide the disclosed grooves to make it easier to handle and dispose of the sheet or bag (e.g. by folding contaminated portions onto themselves).

A similar discussion to that used above applies to each of the independent claims argued on pp 27-30.

The arguments against the rejections of claims over Santelli, Trogolo et al, Nakamura, Otten et al and Weder et al are similar to those already discussed, and the same responses apply.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Dennis Cordray/

Examiner, Art Unit 1791

Conferees:

/Steven P. Griffin/

Supervisory Patent Examiner, Art Unit 1791

/Christopher A. Fiorilla/

Chris Fiorilla

TQAS, TC1700